No. 79-1543

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
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Washington, D.C. 20530

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Petitioners seek review of a judgment reversing the district court's award of attorney's fees against the respondent federal officials pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.

1. The case arose out of the fatal shooting of a black male by a white Arkansas law enforcement officer who was subsequently acquitted of a charge of voluntary manslaughter by a state court jury. The United States Department of Justice, after reviewing the trial transcript and reports of the Federal Bureau of Investigation, determined not to initiate prosecution under 18 U.S.C. 242, a federal criminal civil rights statute (Pet. App. 21a).

Petitioners, the National Association for the Advancement of Colored People and the family of the deceased, filed this action in August 1975 under 42 U.S.C. 1981 and 1985, challenging the adequacy of the Justice Department's investigation and its decision not to prosecute. Petitioners alleged that the respondent federal officials illegally deferred to the state court proceedings pursuant to a policy established in 1959 by Attorney General William Rogers against federal prosecution of persons tried on state charges, absent compelling reasons. Petitioners contended that, as to civil rights cases, this asserted policy against dual prosecutions was unreasonable and racially discriminatory (Pet. App. 22a).

In February 1977, Attorney General Griffin Bell issued a memorandum providing that every alleged civil rights violation would be evaluated on its own merits, regardless of any enforcement action by state officials (Pet. App. 22a). On the basis of this memorandum, the parties moved jointly to dismiss the action. The district court found that the memorandum was "in accord with the policy objectives which underlie the suit," and it dismissed the action without prejudice (*ibid.*).

2. Petitioners thereafter sought an award of counsel fees and costs under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, which provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981 * * * [or] 1985 * * * of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The district court found that petitioners were a "prevailing party" within the meaning of 42 U.S.C. 1988 because this action was "a catalytic factor" in the issuance of the Bell

memorandum, and it accordingly awarded petitioners attorney's fees and costs (Pet. App. 23a).[1]

A divided court of appeals reversed the district court's award. The court held that the Attorney's Fees Awards Act does not authorize an award of counsel fees against the United States (Pet. App. 31a-45a).[2] It did not address respondents' contention that petitioners were not prevailing parties within the meaning of the Act. Chief Judge Wright, dissenting, concluded that the Act authorized fee awards against the federal government and that petitioners were prevailing parties (*id.* at 46a-68a).[3]

3. The petition presents the question whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of counsel fees against the United States. This question is identical to that presented in *Shannon* v. *United States Department of Housing and Urban Development*, 577 F. 2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978), and *Andrulis* v. *United States*, 609 F. 2d 514 (D.C. Cir. 1979), petition for cert. pending, No. 79-1542.[4] As indicated in our brief in opposition to the petition for certiorari in *Andrulis*, which is being filed concurrently with this opposition, the court of appeals' decision is clearly correct; and nothing has occurred since this Court's denial of review in *Shannon* that would make the issue worthy of review. We therefore rely on the arguments set out in our responses to the petitions filed in *Shannon* and *Andrulis* and have

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[1]The opinion of the district court is reported at 448 F. Supp. 1164.

[2]The rationale of the court of appeals' holding is set out in detail in the government's brief in opposition to the petition for a writ of certiorari in *Andrulis* v. *United States*, 609 F. 2d 514 (D.C. Cir. 1979), petition for cert. pending, No. 79-1542. (See text accompanying note 5, *infra*.)

[3]The opinion of the court of appeals is reported at 609 F. 2d 514.

[4]*Andrulis* was consolidated with the instant case in the court of appeals.

supplied petitioners with copies of our briefs in opposition in those cases.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]The majority of the court of appeals did not address our contention that the district court erred in ruling that petitioners were prevailing parties within the meaning of the Attorney's Fees Awards Act. Respondents argued in the court of appeals that the district court was clearly erroneous in finding that this litigation was "a catalytic factor" in the issuance of the Bell memorandum. Should this Court agree with petitioners that the Act authorizes fee awards against the United States, it should remand the case to the court of appeals for initial review of the district court's ruling that petitioners were prevailing parties. *Davis* v. *Passman*, 442 U.S. 228, 249 (1979).

A "prevailing party" issue is presented in the petition filed by the federal petitioners in *Johnson* v. *Hampton*, petition for cert. pending, No. 79-914; but that case does not involve the question of the relationship between relief sought in a complaint and action subsequently taken by the defendants. There is accordingly no reason to hold this case pending disposition of *Johnson*.